United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 28, 1997

TO : Sandra Dunbar, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Crossroads Arena LLC and Centre Group, Inc.
Case 3-CA-20474 512-5012-0133-2250
512-5012-2500
512-6067--4060

This case was submitted for advice on whether the Employer unlawfully denied the Union access under Holyoke Water Power Co., 273 NLRB 1369 (1985).

The Region is authorized to issue Section 8(a)(3) and (5) complaint, absent settlement, for the following reasons.

We note that, in the past, the Employer had accorded the Union access during events by providing the Union business agent with a visitor's pass and allowing him to then freely contact unit employees as necessary. The Region found no evidence supporting the Employer's assertion that the business agent had disrupted bargaining unit work in the past. To the contrary, the Region uncovered strong evidence that the Employer's new restrictive access policy was in direct retaliation against the Union's protesting of the Employer new work rule which restricted employee breaks.

We therefore conclude that the Region should first allege that the new denial of access was unlawful as discriminatorily motivated in violation of Section 8(a)(3).

Generally speaking, an employer may deny nonemployee union agents access to its property with two exceptions.[1] Under the first exception - the "inaccessibility" exception - nonemployee union agents may gain access to an employer's

[1] NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1955); Lechmere, Inc. v. NLRB, 502 U.S. 527, 139 LRRM 2225 (1992).

property if the union shows that the employer's employees are "beyond the reach of reasonable union efforts to communicate with them."[2] Under the second exception - the "discrimination" exception - non-employee union agents may gain access if the union shows that the employer's access rules "discriminate against union solicitation."[3] Under the discrimination exception, the Board does not balance statutory and property rights - an employer simply may not exercise its property rights in order to discriminate against union activity.[4] Applying this exception, the Board and courts consistently have held that an employer violates Section 8(a)(1) when it denies union agents or organizers access to its property for solicitation or distribution purposes, while granting access to other nonemployees for other similar purposes.[5]

The Babcock discrimination exception has thus far been invoked only with regard to the denial of union access while granting access to other groups (discriminatory enforcement" of a no-solicitation rule). We have concluded, however, that it should apply to an employer's implementation of a no-solicitation rule with a discriminatory object ("discriminatory promulgation" of

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[2] Lechmere, 139 LRRM at 2228, quoting Babcock, 351 U.S. at 113.

[3] Id. at 2229, citing Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978).

[4] See Food Lion, Inc., 304 NLRB 602, 604 (1991) (disparate treatment test is an "alternative" to the balancing of interests); Jean Country, 291 NLRB 11, 12, n.3 (1988) (disparate treatment test and balancing test are "distinct analytical view[s]"); Methodist Hospital, 263 NLRB 411 (1982), enfd. 733 F.2d 43, 47, 116 LRRM 2327 (7th Cir. 1984).

[5] Emery Realty, Inc. v. NLRB, 863 F.2d 1259, 1263 (6th Cir. 1988), enfg. 286 NLRB 372 (1987); Davis Supermarkets, 306 NLRB 426, 427 (1992), enfd. 2 F.3d 1162 (D.C. 1993); Ordman's Park & Shop, 292 NLRB 953, 955-956 (1989).

rule).[6] Both types of conduct constitute discriminatory assertions of property rights to interfere with Section 7 or union activity. The Board has long held that an employer's implementation of an otherwise valid rule limiting employee solicitation activities, if motivated by a discriminatory purpose of inhibiting union activity, violates the Act.[7]

In the instant case, the Employer unilaterally revoked its prior free access policy, and substituted a restrictive access policy, in retaliation against the Union's prior protest of a changed working condition. The Employer thereby acted discriminatorily against clearly protected Union activity. The Employer's defensive assertion, that the Union business agent's access had been disruptive, is patently pretextual. Therefore, the Employer's new

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[6] Gooding's Supermarkets, Case 12-CA-17371, Advice Memorandum dated April 7, 1997. See also Nashville Plastic Products, 313 NLRB 462 (1993), where the Board found unlawful the discriminatory promulgation of a rule, allegedly prohibiting all access by off-duty employees, in response to union handbilling and with the purpose of restraining Section 7 rights. The employer had asserted that the off-duty employees should be considered non-employees subject to Lechmere. Although the Board rejected that contention, its discriminatory promulgation analysis preceded and did not depend upon its subsequent determination that off-duty employees were "employees" not subject to the Lechmere rubric.

[7] See Woodview Rehabilitation Center, 265 NLRB 838 (1982) (even if rule prohibiting employee solicitations on work time was lawful on its face, employer's implementation of the rule in response to and to defeat union activity was unlawful); Ward Manufacturing, 152 NLRB 1270 (1965) (facially neutral rule was discriminatorily promulgated where it was posted the day after union petition was filed and there was no evidence it was promulgated to prevent workplace disruptions or had any other purpose other than to restrict union activity); Canondale Corp., 310 NLRB 845, 849 (1993); Bon Marche, 308 NLRB 184, 185 (1992); Montgomery Ward, 220 NLRB 373, 388 (1975), enfd. 554 F.2d 996 (10th Cir. 1977).

restrictive access policy was discriminatory in violation of Section 8(a)(3).

The Region should also allege that the newly restrictive access policy was a unilateral change of the Employer's past practice in violation of Section 8(a)(5).[8]

Finally, regarding a Section 8(a)(5) violation under Holyoke Water Power Co., supra, we conclude that there is insufficient evidence to support such an allegation. We note the novel circumstances here, involving unit employees who work only sporadically and part-time, which support an argument that Union access during events should be required as the only effective means for Union representation under Holyoke Water Power Co. However, the Employer here did not impose a blanket denial of all Union access during events. To the contrary, the Employer did provide on-site access, albeit in a private room to which employees would come and meet with the business agent before or after their shifts. The Employer also continued to accord the Union business agent the right to purchase his own ticket to the event and to then meet with or observe unit employees as any paying customer. There is no evidence that the Union was incapable of effectively representing unit employees because of this more limited access. Therefore, we would not argue a violation under Holyoke Water Power Co. since this case otherwise presents violations of Section 8(a)(3) and (5) under the above discussed theories.

B.J.K.

[8] See, e.g., Ernst Home Centers, Inc., 308 NLRB 848 (1992)(Section 8(a)(5) unilateral change in prohibiting union representatives from having limited conversations with employees on the sales floor and restricting conversations to breakroom or lunchroom.)